FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden, California State Prison at San Quentin; DANIEL E. LUNGREN, Attorney General of the State of California,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

Respondent,

PATRICK BRUCE GORDON,

Real Party In Interest.

No. 94-70565

D.C. No. CV-91-882-LKK

OPINION

Petition for Writ of Mandamus to the United States District Court for the Eastern District of California

Argued and Submitted January 18, 1996—San Francisco, California

Filed February 21, 1997

Before: Charles Wiggins, John T. Noonan, and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals denied a petition for a writ of mandamus. The court held that a state lacks standing to challenge a capital habeas corpus petitioner's request under the Anti-Drug Abuse Act for funds for the investigation of unexhausted state claims.

While under a sentence of death, real party in interest Patrick Gordon filed a federal habeas corpus petition containing over 80 claims, more than 60 of which had not been exhausted in state court. Gordon moved for funds under § 848(q)(9) of the Anti-Drug Abuse Act (ADAA) for investigative and expert fees. A magistrate judge (MJ) denied the request on the ground that there were unexhausted claims. The district court stayed the habeas proceeding to allow Gordon to exhaust his state remedies.

Gordon's federally appointed counsel applied to the California Supreme Court for appointment and for investigative and expert funds. The state court appointed counsel, but denied the requested funds. Gordon again applied to the district court for funds. The MJ denied the request on the ground that the habeas proceeding had been stayed.

On June 27, 1994, the district court struck the State of California's brief on issues relating to Gordon's entitlement to ADAA funds on the ground that § 848(q)(9) requires ex parte consideration of an application for them. The court also ruled that it retained jurisdiction to consider Gordon's request despite the earlier stay of the federal action.

When the State sought interlocutory appeal, the district court ruled on July 25, 1994 that § 848(q)(9) requires authorization of investigative funds on a finding that they are reasonably necessary for the representation of a federal death

penalty habeas petitioner, even if the funds are to be used for investigating unexhausted claims.

The district court issued an order on November 15, 1994 that vacated the stay, struck without prejudice Gordon's habeas petition, and allowed him to file another. This in effect returned the case to its procedural posture before Gordon alleged his unexhausted claims. The order also allowed Gordon to reapply for investigative funds. On July 25, 1996, the court denied Gordon's application for funds.

The State filed a mandamus petition, challenging and seeking a stay of the district court's orders of June 27, July 25, and November 15, 1994. The State contended that § 848(q)(9) does not authorize the use of federal funds to pursue state remedies on unexhausted claims.

[1] Because Gordon's petition contained unexhausted state claims, dismissal of the federal action was required. [2] The district court corrected this error in its November 15 order when it dismissed Gordon's petition without prejudice. Because the court vacated the stay and dismissed the petition, the State could not object that the stay precluded the district court from entertaining a request for fees under § 848(q)(9).

[3] Mandamus is a drastic remedy that should be invoked only in extraordinary circumstances. The district court's stay did not warrant issuance of the writ.

[4] The State lacked standing to challenge the fees request. Persons who are not parties before the district court may not appeal that court's order or judgment except in extraordinary circumstances. While an appeal may be the only avenue to review an award of fees, § 848(q)(9) contemplates that no party but the prisoner will participate in ex parte proceedings. The State had no standing to petition the court of appeals to preclude the district court from considering a § 848(q)(9) fee request in an ex parte proceeding.

[5] The district court may entertain a § 848(q)(9) fee request even after it dismisses a mixed habeas petition without prejudice. Congress established a right to preapplication legal assistance for capital defendants in federal habeas corpus proceedings.

COUNSEL

Ward A. Campbell, Deputy Attorney General and William G. Prahl, Deputy Attorney General, Sacramento, California, for the petitioners.

James R. Kirby II, Segal & Kirby, Sacramento, California, for the real party in interest.

OPINION

WIGGINS, Circuit Judge:

OVERVIEW

Arthur Calderon, warden of the California State Prison at San Quentin, and Daniel Lungren, attorney general of California, (hereinafter "the State") petition for writ of mandamus and move to stay the district court's orders relating to the availability of investigative and expert funds under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(q)(9), for death row inmate Patrick Bruce Gordon, the real party in interest. The State requests that we exercise our supervisory mandamus authority to prohibit the district court from approving federal funds for Gordon under section 848(q)(9), where the funds would be used to investigate unexhausted claims that must be pursued in state court before they may be included in the federal habeas petition. We have jurisdiction under 28 U.S.C. § 1651.

We hold that the district court could properly consider a request for funds under 21 U.S.C. § 848(q)(9) even though no habeas petition was pending after November 15, 1994. Because the district court properly dismissed the mixed habeas petition on November 15, we find moot the State's contention that the earlier stay of the habeas proceedings precluded the district court from considering the defendant's request for section 848(q) fees. We therefore decline to issue the writ of mandamus.[1] Accordingly, we deny the State's emergency motion to stay the district court's June 27, July 25, and November 15, 1994, orders, and the State's Requests for Judicial Notice and for Leave to File Supplemental Exhibit and Pleading to Reply Brief.

FACTS AND PRIOR PROCEEDINGS

We begin with a detailed discussion of the facts and complicated procedural history of this case. On March 13, 1985, Patrick Bruce Gordon, the real party in interest, was sentenced to death by a California court upon his conviction for conspiracy, first degree murder, and robbery in conjunction with a special circumstance.[2] The California Supreme Court affirmed Gordon's conviction and sentence, and the United States Supreme Court denied Gordon's petition for writ of certiorari. *People v. Gordon*, 792 P.2d 251 (Cal. 1990), *cert. denied*, 499 U.S. 913 (1991).

Gordon did not file a habeas petition in state court. Instead, he filed a skeletal petition for habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern Dis-

[1] *See Armster v. United States Dist. Court.*, 792 F.2d 1423, 1425 (9th Cir. 1986) (court may accept mandamus jurisdiction, but deny the petition for writ in exercising its supervisory mandamus authority).

[2] Gordon was sentenced to death for the first-degree murder of an armored car courier during a robbery of a store in Stockton, California on December 19, 1983. He drove the getaway car during commission of the robbery and murder.

trict of California.[3] His execution was stayed and counsel was appointed for him. The matter was referred to a magistrate judge, pursuant to 28 U.S.C. § 636(b)(1)(B). On October 23, 1992, Gordon filed an amended habeas petition containing over eighty claims which challenged both his conviction and death sentence. Approximately sixty of those claims were unexhausted claims. Thereafter, Gordon's counsel moved for investigative and expert funds under 21 U.S.C. § 848(q)(9), which authorizes the district court to fund such services for indigent capital defendants. Because the amended habeas petition contained unexhausted claims, the magistrate judge denied the funding request and the district court stayed the federal habeas proceeding, pursuant to the Eastern District's Local Rule 191(h)(5), to allow Gordon to exhaust his state remedies.

Gordon's federally-appointed counsel applied to the California Supreme Court for appointment to pursue Gordon's state remedies. The state court appointed counsel, but denied Gordon's request for investigative and expert funds. Gordon reapplied to the federal district court for investigative and expert funds. The magistrate judge denied the request because the federal habeas proceeding was stayed. On July 29, 1993, the district court issued an order requiring Gordon and the State to file briefs addressing (1) whether section 848(q)(9) requires the federal district court to authorize funds for investigative services even though the case has been remanded to state court for exhaustion; (2) whether the state court has a due process duty to provide adequate investigative funds; and (3) whether the federal district court has the power to stay an execution until the state provides the funds. Thereafter, on June 27, 1994, the district court issued (1) an order striking the State's brief regarding the applicability of section 848(q)

[3]In his two-page petition, Gordon states only that he is being held in violation of his constitutional rights and requests that the court (1) appoint counsel for him and (2) allow him to file an amended habeas petition after he obtains assistance of counsel.

(9) to Gordon's habeas action because section 848(q)(9) required that requests for funds should be conducted on an *ex parte* basis; and (2) a separate sealed order holding that the district court had jurisdiction to consider Gordon's funding request despite the stay of the federal action.

On the State's motion for a recommendation that the district court certify for interlocutory appeal the June 27 orders, the magistrate judge recommended, *inter alia*, that the district court vacate the unsealed June 27 order[4] and unseal the sealed June 27 order. The district court adopted with the magistrate judge's recommendations in a published opinion. *See Gordon v. Vasquez*, 859 F. Supp. 413 (E.D. Cal. 1994) (hereinafter "July 25 order"). The district court held that section 848(q)(9) mandates the authorization of investigative funds upon a finding that a request is "reasonably necessary" for the representation of a federal death penalty habeas petitioner, notwithstanding the fact that the funds would be used for investigating unexhausted claims. *Id.* at 417.

In September 1994, the State filed a petition for writ of mandamus, seeking to compel the respondent district court to vacate the June 27 and July 25 orders. The State challenged the use of federal funds, authorized under section 848(q)(9), to pursue state remedies on unexhausted claims. In addition, the State challenged the district court's jurisdiction to authorize investigative funds while the federal proceeding was stayed.

Two months later, on November 15, 1994, the district court issued an unpublished order that changed the procedural posture of this case by (1) vacating the stay of the federal proceeding; (2) striking without prejudice Gordon's amended

[4]The magistrate judge concluded that while the amount and use of § 848(q)(9) funds must be considered on an *ex parte* basis, the fact that § 848(q)(9) funds are sought and a determination relative to such a request need not be held in confidence.

habeas petition; and (3) allowing Gordon to file another amended habeas petition. In effect, the district court returned the case back to its procedural posture before Gordon had alleged his unexhausted claims. The November 15 order also allowed Gordon to present a new request for investigative funds within thirty days of the order. On December 9, 1994, Gordon filed under seal an *ex parte* application for investigative funds. On July 24, 1996, the district court issued an amended order denying Gordon's application.[5]

In response to the district court's November 15 order, the State filed an amended petition for writ of mandamus on November 30, 1994. The amended petition requests this court to stay the district court's November 15 order pending resolution of this matter in addition to vacating the June 27 and July 25 orders named in the original petition for writ of mandamus. According to the State, the November 15 order condoned the use of section 848(q)(9) funds to investigate unexhausted potential claims, at least insofar as reasonably necessary to determine whether there was enough factual support for a claim to warrant bringing it before state court, or to determine whether the factual support was so thin that the attorney might omit it entirely from the federal petition. The State argues that the November 15 order allows the prisoner to seek federal funds to develop claims that would otherwise necessarily be presented to the state court first, thereby creating an incentive for prisoners to start the habeas process in federal court *before* exhausting their claims in state court to obtain access to federal investigative funds. On December 13, 1994, the State filed an emergency motion to stay all three district court orders.

The State contends in its petitions for writ of mandamus and emergency motion that section 848(q) does not authorize the use of federal funds to pursue state remedies on unex-

[5]The order superceded its July 11, 1996, order addressing the same issue.

hausted claims. The State believes that the authorization of federal funds for such use is illegal and, therefore, seeks a writ of mandamus to prevent this occurrence.

DISCUSSION

We have jurisdiction under the All Writs Act, 28 U.S.C. § 1651, to review the district court's orders because this case presents a "question of law of major importance to the administration of the district courts." *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1307 (9th Cir. 1982) ("[T]he purpose of our review . . . is to provide necessary guidance to the district courts and to assist them in their efforts to ensure that the judicial system operates in an orderly and efficient manner."), *judgment aff'd sub nom. by an equally divided Court, Arizona v. United States Dist. Court*, 459 U.S. 1191 (1983).

The State challenges the district court's determination that 21 U.S.C. § 848(q)(9)[6] provides investigative fees to a habeas petitioner even after the habeas petition is stayed to enable the petitioner to exhaust his state claims. Although the State expressly asserts that it challenges only the district court's actions after the stay of the federal action, and does not challenge the stay of the federal proceeding,[7] the State nonetheless appears to argue that the district court erred in staying rather

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[6]Section 848(q)(9) provides in pertinent part:

> Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore.

21 U.S.C. § 848(q)(9).

[7]The State writes in the original petition for writ of mandamus that it is "not even challenging the stay of the proceedings. Rather, [the State] herein challenges only the respondent court's opinion that by issuing this stay of proceedings that the federal court also has jurisdiction to issue other orders including granting investigative fee requests."

than dismissing the federal action upon the filing of the amended habeas petition. For that reason, and because of certain language in the district court's published July 25 order, we address this argument as well.

[1] We first hold that the district court erroneously stated in its July 25 order that dismissal of mixed habeas petitions, as required by *Rose v. Lundy*, 455 U.S. 509, 513-520, 102 S. Ct. 1198, 1200-04, 71 L. Ed. 2d 379 (1982), "is not the rule in the Ninth Circuit." Because Gordon's amended habeas corpus petition undisputedly contained unexhausted state claims, dismissal of the federal action was required. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims.") (citing *Rose*, 455 U.S. at 513-20); *see also James v. Borg*, 24 F.3d 20, 24 (9th Cir.) ("In general, a habeas petition should be dismissed if a petitioner has failed to exhaust state remedies as to even one claim."), *cert. denied*, 115 S. Ct. 333 (1994).[8]

The district court reached its erroneous conclusion by relying on our opinion in *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988), *cert. denied*, 493 U.S. 906 (1989), as support for staying the federal habeas action instead of dismissing the action pursuant to *Rose*. *Gordon*, 859 F. Supp. at 417. Specifically, it relied on the following passage from *Neuschafer*:

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[8]The presence of unexhausted claims is not, however, a jurisdictional bar for appellate review of the habeas petition. *See Granberry v. Greer*, 481 U.S. 129, 131 (1987) ("[F]ailure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application" where state failed to raise exhaustion defense in the district court) (citations omitted); *see also Acosta-Huerta v. Estelle*, 7 F.3d 139, 143 (9th Cir. 1993) (denying unexhausted claim that did not arise from federal law to reach the merits of petitioner's Sixth Amendment claim).

> When a petitioner has not exhausted his state remedies before filing a federal habeas petition, a district court may hold the federal petition in abeyance, issue a stay of execution, and allow the petitioner an opportunity to exhaust his state remedies.

Id. (quoting *Neuschafer*, 860 F.2d at 1472 n.1). In *Neuschafer*, we determined under what circumstance a successive habeas petition constitutes an abuse of the writ. 860 F.2d at 1474.

Unlike *Rose*, *Neuschafer* did not involve a mixed habeas petition. *Neuschafer* addressed when a federal habeas action must be completed in one proceeding, finding specifically that the failure to raise in a prior petition an unexhausted claim because it would be barred by *Rose* precludes a finding that the prisoner deliberately withheld that claim from his first petition and thereby abused the writ by raising that claim in a second habeas petition once the claim has been exhausted. *Id.* (citing *Tannehill v. Fitzharris*, 451 F.2d 1322, 1324 (9th Cir. 1971)).[9] *Rose*, in contrast, focused on protecting the state courts' role in enforcement of federal law and preventing disruption of state judicial proceedings. *Rose*, 455 U.S. at 518.[10]

[2] The district court effectively corrected this error in its November 15 order when it dismissed Gordon's habeas petition without prejudice. Because the district court vacated the

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[9]Subsequently, the Supreme Court's decision in *McClesky v. Zant*, held that the abuse of the writ is not limited to deliberate abandonment, but also includes instances of inexcusable neglect. *McClesky*, 499 U.S. 467, 489-90 (1990). We need not address here what effect *McClesky* has on *Neuschafer* because *Neuschafer* is in any event not relevant to the facts in this case.

[10]It is important to distinguish that we are not dealing with the situation where there is a habeas petition filed and the prisoner then merely contemplates amending the habeas petition by adding unexhausted claims. *Cf. Fetterly*, 997 F.2d at 1302 (affirming stay of federal action to allow habeas petitioner to exhaust claims in state court *prior* to amending federal habeas petition).

stay on the habeas petition and dismissed it, the State presently cannot object that the stay precluded the district court from entertaining a request for fees under section 848(q)(9). To ensure the situation will not recur, we feel compelled to state explicitly the error in the July 25 order. This need arises because the district court did not vacate that part of the order, but rather it simply acted without regard to its previous conclusion that the stay of a mixed petition was permissible. Accordingly, we vacate that part (II. B) of the July 25 order discussing *Rose*.

[3] Despite our conclusion that the filing of a mixed habeas petition required dismissal, we do not believe that the petition for mandamus should be granted. "Mandamus is a drastic remedy that should be invoked only in extraordinary circumstances." *Armster*, 792 F.2d at 1431 (citation omitted). We do not find that the district court's stay warrants issuance of the writ. We are confident that the district court will act consistently with this opinion, as indeed it has since it issued the November 15 order.

[4] We further hold that the State lacks standing to challenge the fees request under section 848(q)(9). The district court must determine whether fees are appropriate in an *ex parte* proceeding.[11] The general rule is well-settled that persons who are not parties before the district court may not appeal that court's order or judgment except in extraordinary circumstances. *In re Proceedings Before Fed. Grand Jury*, 643 F.2d 641, 643 (9th Cir. 1981) (dismissing appeal for lack of standing). While an appeal by a state may be the only avenue to review an award of section 848(q) fees, *cf. Bank of Am. v. M/V Exec.*, 797 F.2d 772 (9th Cir. 1986) (noting equity

[11]The Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 stat. 1214, amends § 848(q)(9) so that the proceeding is not *ex parte*, but that amendment does not apply to petitions filed in federal court before the Act became effective on April 24, 1996. *Jeffries v. Wood*, No. 95-99003 (9th Cir. December 20, 1996).

favors hearing appeal from only party who could object to issue), section 848(q)(9) contemplated that no party but the prisoner would participate in the *ex parte* proceeding. Thus, the State has no standing to petition this court to preclude the district court from considering a § 848(q) fee request in an *ex parte* proceeding.

[5] Moreover, we note that under *McFarland v. Scott*, 512 U.S. 849, —, 114 S. Ct. 2568, 2572 (1994), the district court may entertain a section 848(q) fee request even after it dismisses a mixed habeas petition without prejudice. This request is authorized in "any post conviction proceeding" under the federal habeas corpus statutes, to be considered in accordance with section 848(q)(5)-(9). 21 U.S.C. § 848(q)(4)(B). *McFarland* states that "[i]n adopting § 848(q)(4)(B), Congress thus established a right to preapplication legal assistance for capital defendants in federal habeas corpus proceedings." *McFarland*, 114 S. Ct. at 2572.

CONCLUSION

For the foregoing reasons, we DENY the amended petition for writ of mandamus. We DENY the State's Requests for Judicial Notice and for Leave to File Supplemental Exhibit and Pleading to Reply Brief and deny the State's emergency motion to stay the district court's June 27, July 25, and November 15, 1994, orders.

APPENDIX "C"

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

PATRICK BRUCE GORDON,

Plaintiff,

v.

DANIEL VASQUEZ, etc., et al. ,

Defendants.

_____/

NO. CIV. S-91-822 LKK/PAN

ORDER

Petitioner, a state prisoner condemned to death, filed pro se a petition for habeas corpus. The matter was referred to a magistrate judge, see 28 U.S.C. § 636(b)(1), Local Rules 302(c)(17), 303, 304, who granted permission to proceed in forma pauperis, stayed the execution, and initiated the process of obtaining counsel for petitioner. See Local Rule 191(d),(h)(2).[1] In due course, counsel

1. Local Rule 191(d) provides for appointment of counsel in death penalty habeas cases, and 191(h)(2) provides for temporary stays of execution pending appointment of counsel. See n.7, infra.

were appointed to represent petitioner and, after filing an amended petition, they moved for investigative and expert funds. The magistrate judge could not determine whether petitioner's claims had been exhausted and apparently for that reason denied the request.

Petitioner's second request for investigative funds was also denied, this time specifically on the basis that the petition contained unexhausted claims. Shortly thereafter, the magistrate judge formally found that the petition contained unexhausted claims and recommended that these proceedings be stayed pursuant to Local Rule 191(h)(5).[2] The recommendation relative to a stay was adopted by this court.

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2. That rule provides: "If the petition indicates that there are unexhausted claims for which a state court remedy is still available, petitioner will be granted a sixty (60) day stay of execution in which to seek a further stay from the state court in order to litigate the unexhausted claims in state court. During the proceedings in state court, the proceedings on the petition will be stayed. After the state court proceedings have been completed, petitioner may amend the petition with respect to the newly exhausted claims."

Petitioner, through his federally appointed attorneys, then applied to the California Supreme Court for appointment to pursue his state remedies and requested funds from that court to investigate potential habeas issues. Although counsel were appointed, the request for funds was denied. Thereupon counsel for petitioner reapplied to this court for funds for investigation. The magistrate judge summarily denied the request, stating:

> Petitioner has requested funds to investigate habeas corpus issues. This proceeding is presently stayed pending the completion of proceedings in the California Supreme Court. E.D. Cal., L.R. 191(h)(5); Order May 5, 1993. Accordingly, it is ORDERED that petitioner's request for investigative funds, filed June 28, 1993, is denied.

Order filed June 29, 1993.

Petitioner then sought reconsideration from this court, arguing that the magistrate judge's order was contrary to law. He contends that 21 U.S.C. § 848(q) mandates authorization of investigative funds upon a finding that a request is reasonably necessary for the

representation of federal death penalty habeas petitioners, notwithstanding the fact that the funds are for the express purpose of investigating facts on unexhausted claims to be presented to a state court.

This court ordered further briefing on the issue from both petitioner and the Attorney General of the State of California. Thereafter, I concluded that the order directed to the Attorney General was inappropriate since, under the statute, consideration of the request for investigative fees is an *ex parte* proceeding, which has been interpreted to mean an *in camera* proceeding. See 21 U.S.C. § 848(q)(9); Lawson v. Dixon, 3 F.3d 743, 751 (4th Cir. 1993), cert. denied, 114 S. Ct. 1208 (1994) (the plain language of 21 U.S.C. § 848(q)(9) providing for *ex parte* proceedings should not be overlooked simply because the court prefers all such motions to be handled on the record); Guide to Judiciary Policies and Procedures, Vol. VII, § 3.03 (*ex parte* application shall be heard *in*

camera).[3] But see McKinney v. Paskett, 753 F. Supp. 861, 863 (D. Idaho 1990) (petitioner required to show specifically the reason why services are necessary before being allowed an *ex parte* hearing).

Because I had concluded that the State was not an interested party, I ordered its briefing and its appearance relative to the Motion to Reconsider stricken. For the same reason, the court's resolution of the issue was ordered sealed. The matter was then remanded to the magistrate judge for further proceedings consistent with the court's sealed opinion.

Upon return to the magistrate judge, the State moved, inter alia, for a recommendation to this court for interlocutory appeal of the order striking the State's appearance and sealing the order disposing of the motion. Instead, the magistrate judge has fied Findings and

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3. That section interprets an analogous section in the Criminal Justice Act. See In re Berger, 498 U.S. 233 (1991) (adopting guidelines as an interpretive aid).

Recommendations that the order be unsealed. He suggests that while the amount and use of funds must be considered *ex parte*, the fact that funds are sought and a determination relative to such a request need not be held in confidence. The court is satisfied that the distinction drawn by the magistrate judge is sensible. The court also notes that since its decision, the United States Supreme Court has issued its opinion in McFarland v. Scott, Director, Texas Dep't of Criminal Justice, Institutional Div., ___ S. Ct. ___, 62 U.S.L.W. 4713 (March 29, 1994), which indirectly sheds some light on the issues resolved by the court. Given the magistrate judge's recommendation and the decision in McFarland, the court will issue a new, public and slightly revised opinion in this matter.

I

STANDARD OF REVIEW

Because federal habeas proceedings are civil in nature,[4] the power of the district court to refer matters

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4. Although the proceedings under which petitioner

for review by a magistrate judge is quite broad. Thus, a district court judge may designate a magistrate judge to hear and determine any nondispositive pretrial matters brought by a person seeking habeas relief, see 28 U.S.C. § 636(b)(1)(A); Local Rule 302(c)(17), and may refer dispositive motions for Findings and Recommendations. 28 U.S.C. § 636(b)(1)(B); Local Rule 302(a) & (c)(17). The standard employed by the district court in reviewing decisions of the magistrate judge depends upon the character of the underlying decision.

Non-dispositive pretrial motions referred to the magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) are reviewed under a clearly erroneous or contrary to law standard. See 28 U.S.C. § 636(b)(1)(A); Local Rule 303(f); United States v. Raddatz, 447 U.S. 667, 673 (1980).

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was convicted in state court were criminal, it has long been established that habeas proceedings in federal court are civil in nature. Browder v. Director, Dep't of Corrections of Illinois, 434 U.S. 257, 269 (1978), citing Fisher v. Baker, 203 U.S. 174, 181 (1906).

On the other hand, a magistrate judge's determination concerning matters referred pursuant to 28 U.S.C. § 636(b)(1)(B) are for the most part reviewed de novo. Thus, the district court reviews de novo those portions of the proposed findings of fact to which objection has been made, 28 U.S.C. § 636(b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982), and the magistrate's conclusions of law. Barilla v. Ervin, 886 F.2d 1514, 1518 (9th Cir. 1989), citing Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983). The court may, however, assume the correctness of that portion of the proposed findings of fact to which no objection has been made and decide the motion on the applicable law. See United States v. Remsing, 874 F.2d 614,617 (9th Cir. 1989), citing Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979).[5]

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5. The failure of a party to file objections does not relieve the district court of its obligation to give de novo

The court is not bound to adopt the magistrate's Findings and Recommendations; on the contrary, the court must exercise "sound judicial discretion" in making its own determination on the record. Raddatz, 447 U.S. at 675-76. The court may accept, reject, or modify, in whole or in part, the magistrate's findings or recommendations. 28 U.S.C. § 636(b)(1)(C); Remsing, 874 F.2d at 617.

In the matter at bar, petitioner seeks review of the magistrate judge's denial of fees, a non-dispositive pretrial order. Accordingly, the court employs the "clearly erroneous or contrary to law" standard of review. Where, as here, there are no disputed issues of fact and the question before the court is thus purely legal in nature, the standards of review under 28 U.S.C. § 636(b)(1)(A) and 28 U.S.C. § 636(b)(1)(C) converge. That is,

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review of conclusions of law. Barilla, 886 F.2d at 1518.

under either standard of review, the court must determine whether the magistrate judge's conclusions of law are right or wrong.

II

THE RIGHT TO INVESTIGATIVE FUNDS

The magistrate judge's denial of the requested funds in this case relied exclusively on the fact that, pursuant to Local Rule 191(h)(5), a stay had issued to permit the exhaustion of state claims. Because of the cryptic nature of the order, it is unclear why the existence of a stay was viewed as precluding the granting of fees. Since the magistrate judge apparently did not consider the merits of the request, however, I must conclude that he thought it was improper to do so. As I explain below, two possible procedural and one possible substantive reason present themselves as justifications for such a conclusion. I consider each reason seriatim.

A. Stays

One possible reason that the magistrate judge might conclude that he should not entertain a motion for investigative fees is because this court had entered the stay in effect at the time the motion was made. See Reynaga v. Cammisa, 971 F.2d 414, 416-17 (9th Cir. 1992) (magistrate judge lacked authority to enter stay in habeas case). If that was his reasoning, the magistrate judge, upon denying the motion, should have explained that it should be directed to the district court. Be that as it may, by virtue of the motion to reconsider the matter is now before this court subject to the court's further order, and thus the stay is no impediment to ordering fees if it is otherwise appropriate.

The purpose of issuing a stay of a federal court action rather than dismissing it in favor of state court proceedings is to protect a litigant's federal rights during the pendency of the state court proceedings. See, e.g., Attwood v. Mendocino Coast Dist. Hospital, 886 F.2d 241, 243 (9th Cir. 1989) (purpose of doctrine is to ensure

federal forum remains open if the state forum proves to be inadequate); and see Annotation, Stay of Action in Federal Court Until Determination of Similar Action Pending in State Court, 5 A.L.R. Fed. 10, 105 (1970) (same). In the matter at bar, the state court has refused to provide petitioner with the resources assertedly necessary to investigate his claim. Thus, if petitioner has a federal right to such resources, issuance of an order providing them is consistent with the reasons for retention of jurisdiction in the first place. See, e.g., Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949) (federal court stayed case in favor of state court proceeding on the condition that the Federal Rules relative to depositions were applied in state court).

B. Unexhausted Claims

A second possible reason suggested by the magistrate's refusal to grant fees prior to the stay may relate to the fact that the amended petition contains unexhausted claims. In Rose v. Lundy, 455 U.S. 509

(1982), the Supreme Court held that a district court must dismiss a petition for habeas corpus containing unexhausted claims. The magistrate judge may have thought that by virtue of Rose, he was without power to order investigative fees to pursue unexhausted claims on the premise that dismissal is required. That is not the rule in the Ninth Circuit. The circuit has held that:

> When a petitioner has not exhausted his state remedies before filing a federal habeas petition, a district court may hold the federal petition in abeyance, issue a stay of execution, and allow the petitioner an opportunity to exhaust his state remedies.

Neuschafer v. Whitley, 860 F.2d 1470, 1472 n.1 (9th Cir. 1988), cert. denied, 493 U.S. 906 (1989).[6] Local Rule

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6. A plurality in Rose argued that when a petitioner elects to proceed on the exhausted claims, later petitions containing subsequently exhausted claims were subject to dismissal as an abuse of the writ. The Neuschafer court declined to follow this suggestion, believing that the circuit's earlier decision in Tannehill v. Fitzharris, 451 F.2d 1322 (9th Cir. 1971), precluded a finding that a petitioner who withholds unexhausted claims from the first federal petition does so deliberately, thereby abusing the writ. In a concurring opinion, Judge Alarcon suggested a procedure to prevent an "uncontrollable succession of

191(h), a product of the Ninth Circuit Death Penalty Task Force,[7] was an attempt to accommodate both Supreme Court and Ninth Circuit precedent, a duty of the Task Force, this court and the magistrate judge.[8]

In sum, where there are both exhausted and unexhausted claims tendered in a petition, the court may grant a stay pursuant to Local Rule 191(h) rather than dismissing the pending habeas case. It follows that since

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petitions." Neuschafer, 860 F.2d at 1478 (Alarcon, J., concurring). That procedure was adopted by this district, en banc. See Ainsworth v. Vasquez, 759 F. Supp. 1467 (E.D. Cal. 1991).

7. In 1987, the Honorable James Browning, then Chief Judge of the Ninth Circuit, appointed a task force to consider the problems likely to be experienced within the circuit by virtue of the impending filing of a large number of death penalty habeas cases in the district courts. The task force was composed of representatives of the federal judiciary, various state attorney generals and defense counsel. Among its accomplishments, the task force produced a model local rule for the district courts. This district adopted that rule.

8. The district court and its adjunct magistrate judges, as subordinate entities bound by the rule of precedent, must conform their understanding of Supreme Court decisions to the interpretation of those decisions by the Ninth Circuit.

the court retains jurisdiction when a matter is stayed, see Burlington Northern Railroad Co. v. Crow Tribal Council, 940 F.2d 1239, 1245 n.3 (9th Cir. 1991) (federal courts may stay proceedings and retain jurisdiction pending exhaustion of tribal court remedies), the stay does not affect the court's jurisdiction to grant fee requests.

Having disposed of the two possible procedural bars, I now turn to the issue of whether the statute permits the granting of investigative fees relative to unexhausted claims.

C. **The Statute**

The issue before the court is whether 21 U.S.C. § 848(q) authorizes the district court to provide funds to a federal habeas petitioner to investigate unexhausted claims which are to be presented to a state court. The question is one of statutory interpretation. As with any such question, a district court must first determine whether there is binding authority construing the statute. Tello v. McMahon, 677 F. Supp. 1436, 1441 (E.D. Cal. 1988). In

the matter at bar, neither the Supreme Court nor the Ninth Circuit has spoken to the issue at bar. Accordingly, the court must undertake its explication employing the traditional methods of statutory construction. Id.

Analysis commences with application of the plain meaning rule. If the meaning of the statute is clear, no further construction is required, id., for "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. __, 112 S. Ct. 1146, 1149 (1992); see also Church of Scientology v. United States Dep't of Justice, 612 F.2d 417, 421 (9th Cir. 1979) ("Congress does mean what it says and thus the statutory language is normally the best evidence of congressional intent"). If the language of the statute is ambiguous, resort may be had to textual and extrinsic aids of construction. Dodd v. John Hancock Mut. Life Ins. Co., 688 F. Supp. 564, 569 (E.D. Cal. 1988).

The statute at issue plainly commands federal appointment of attorneys for indigents seeking federal habeas corpus to review a state proceeding resulting in imposition of a sentence of death.[9] It also commands that appointed counsel represent the defendant in all post-petition proceedings without regard to forum.[10] Finally, it just as plainly commands the court to pay for support services, including investigative services, which are

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9. "In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9)." 21 U.S.C. § 848(q)(4)(B).

10. "[E]ach attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications[] for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." 21 U.S.C. § 848(q)(8).

reasonably necessary for the adequate representation of the defendant.[11]

The statute's plain meaning concerning the payment of fees without reference to the forum is made clear by the congressional directive that federally appointed counsel represent the defendant in competency and clemency matters, see 21 U.S.C. § 848(q)(8). Those proceedings ordinarily occur in state forums after the conclusion of the federal habeas case. See Hill v. Lockhart, 992 F.2d 801, 803 (8th Cir. 1993) (the statute requires provision of attorneys for competency and clemency proceedings even though they are, frequently [] not commenced until state and federal post conviction relief have been denied").

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11. "Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10)". 21 U.S.C. § 848(q)(9) (emphasis added).

The only source of even potential ambiguity derives from the use of the term "defendant" rather than "petitioner" in the pertinent statute. That usage might suggest that only those facing capital punishment by virtue of conviction in a federal court are entitled to investigative fees. That possibility is enhanced by the fact that subsections 1, 2, and 3 of section 848(q) address the appeal rights of those suffering the imposition of a death sentence after conviction in federal court. Nonetheless, the argument simply cannot lie. Included among those entitled to appointment of counsel under the statute is a "defendant" who "seek[s] to vacate or set aside a death sentence" by bringing a "proceeding under § 2254." 21 U.S.C. § 848(q)(4)(B). Section 2254, of course, refers to habeas petitions following state conviction. See also Lawson v. Dixon, 3 F.3d at 751 n.5 ("Congress clearly intended to create a counsel and expert-services guarantee in federal habeas review of state-imposed death sentences.").

Section 848(q)(4)(B) is clear and unambiguous. Such unambiguous language controls the court's interpretation, absent "a clearly expressed legislative intent to the contrary." Russello v. United States, 464 U.S. 16, 20 (1983). American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (unless Congress has clearly indicated that its intentions are contrary to the words it employed in the statute, the words of the statute are both the starting and ending point of the interpretation). I now turn to the question of whether Congress has expressed a contrary intention.

Section 848(q) of Title 21 was added to the code in 1988 as part of the Anti-Drug Abuse Act. There appear to have been no accompanying Senate or House reports. See 1988 U.S.C.C.A.N. 5937. Nor does there appear to be any other extra statutory expression of legislative intent. Under these circumstances, there simply is no clearly expressed legislative intent contrary to the statute's plain meaning.

Despite the statute's apparent command, at least four courts have opined that section 848(q)(8)'s provisions do not reach proceedings seeking to exhaust state habeas remedies after the filing of a federal petition containing both exhausted and unexhausted claims. See In re Lindsey, 875 F.2d 1502, 1506 (11th Cir. 1989); Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993); Coleman v. Vasquez, 771 F. Supp. 300, 304 n.5 (N.D. Cal. 1991); McKinney v. Paskett, 753 F. Supp. at 865. Although four cases may initially appear impressive, examination suggests that they are weak precedent.

I begin by noting that the relevant discussions in all four cases are dicta. Lindsey purports to address the issue of the granting of fees where there are no viable federal claims;[12] in Hill, the issue resolved was that attorney's

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12. In Lindsey, petitioner sought appointment of an attorney and psychiatrist on a petition which contained only one unexhausted claim. The court concluded that there was no "proceeding under 28 U.S.C. § 2254," and thus that 21 U.S.C. § 848(q) was inapplicable. In re Lindsey, 875 F.2d at 1506. The Supreme Court's recent

fees were, under appropriate standards, recoverable for a clemency hearing; in Coleman, the court resolved that fees for a McCleskey investigation on an exhausted petition were available under the statute;[13] finally, although McKinney tendered the issue at bar, the court found the issue moot since petitioner was not entitled to return to the state court.

Also undermining the Lindsey line of cases is the fact that all three cases adopting its dicta did so without further analysis. Thus the persuasive effect of these later

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decision in McFarland, 62 U.S.L.W. 4713 (March 29, 1994), may be read as casting some doubt on the holding in Lindsey. Even if this is not the case, however, Lindsey's rationale is inapplicable in this circuit to cases such as that at bar, where the petition contains both exhausted and unexhausted claims and thus falls within Neuschafer.

13. In McCleskey v. Zant, 499 U.S. 467 (1991), the Supreme Court held that the filing of a federal habeas petition raising claims not raised in a previous petition may be treated as an abuse of the writ and thus a petitioner must ordinarily show cause why he failed to raise the claim initially and demonstrate prejudice arising from the court's failure to address the new claim. Counsel for petitioners view McCleskey as, in effect, imposing a new burden to ensure that all possible claims have been identified and exhausted in the first petition.

cases ultimately turns on the persuasiveness of that case. Yet, as I now explain, Lindsey's reasoning is hardly compelling.

The Lindsey court tendered three reasons for reaching its conclusion -- a parade of horribles, the asserted novelty of the result, and an asserted uncertainty concerning the statute's language. Upon examination, each argument is simply unconvincing.

The Lindsey court argued that permitting the payment of fees "under subsection 848(q)(8) would have the practical effect of supplanting the state-court systems for the appointment of counsel in collateral review cases." In re Lindsey, 875 F.2d at 1506. It thought such a holding "would encourage state prisoners to ignore . . . the proper sequence, developed from concerns for federalism, for seeking collateral relief from state-court judgments in death-penalty cases." Id.[14] This speculation concerning

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14. The court suggested that petitioners "for no reason other than to gain the assistance of federally

the future course of collateral litigation appears to be wholly unwarranted. As Hill demonstrates, a proper regard for the statutory language making the provision of expenses dependent on "reasonable necessity" precludes the granting of expenses when the state court will provide the expenses sought in the federal proceeding. See Hill, 992 F.2d at 803 (services not reasonably necessary unless request made pursuant to a non-frivolous federal habeas proceeding and state law provides no avenue to obtain the services). Thus if a determination of reasonable necessity turns, at least in part, on the unavailability of state-provided fees, the petitioner gains no advantage in circumventing application to the state court when that court will in fact provide fees and expenses.

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appointed counsel and experts throughout all stages of collateral review (both state and federal), would ignore the exhaustion requirement and, before seeking state remedies, futilely file for federal habeas relief. Only after procuring a federally appointed lawyer would state inmates have an incentive to set upon the right track in pursuit of state remedies." In re Lindsey, 875 F.2d at 1506-07.

A second reason tendered was the novelty of the result. This court is uncertain as to what the Lindsey court regarded as novel. Certainly the federal government has long financed civil litigation in the state courts. See 42 U.S.C. §§ 2996-29961 (Legal Services Corporation Act of 1974). Moreover, as the Ninth Circuit has explained, habeas proceedings are

> [D]ramatically different from any other civil action . . . [and] [a]s a result, [we] are not bound to systemically apply traditional rules governing civil proceedings when to do so would be inconsistent with the overriding purposes of the federal habeas corpus statute.

Brown v. Vasquez, 952 F.2d 1164, 1169 (9th Cir.), cert. denied, 112 S. Ct. 1778 (1992).[15] What is true of the

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15. In Brown, the circuit looked with favor on the task force's effort to address another special problem presented to district courts discharging their responsibilities under 28 U.S.C. § 2254. The court approved of the local rule which provided that district courts had jurisdiction to stay an execution upon receipt of a request for counsel to assist in preparation of a petition, finding it a habeas proceeding within the meaning of 28 U.S.C. § 2251. Brown, 952 F.2d at 1165-69. Both the Local Rule and Brown were vindicated in McFarland, 62 U.S.L.W. 4713 (March 29, 1994).

federal judiciary is, a fortiori, true for the national legislature. See supra, n.17.

Finally, the Lindsey court suggested that a greater degree of clarity in expression is required.[16] Perhaps it is true that plain meaning, like beauty, is in the eye of the beholder. With the greatest of respect, however, I must declare my own view that the statute's meaning is plain and provides for investigative fees if the costs are reasonably necessary.[17] Put bluntly, it appears to this

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16. "If Congress had intended so novel a result, we think it would have stated so in unmistakable terms, for example, by expressly providing for the appointment of counsel at federal expense for all inmates seeking collateral review of death sentences, regardless of whether such review was sought in state or federal court." In Re Lindsey, 875 F.2d at 1507.

17. As noted in the text, the High Court in McFarland recently faced the question of whether a request for counsel in a federal death penalty habeas case constituted a proceeding sufficient to stay the state imposed death penalty. The Court explained relative to the federal proceedings that "[o]n its face, this statute grants indigent capital defendants a mandatory right to qualified legal counsel and related services 'in any [federal] post conviction proceeding.'" McFarland, 62 U.S.L.W. at 4714. The Court further explained that "[t]he services of investigators and other experts may be critical

court that the language is plain -- it is the result which Lindsey faults. It is fundamental, however, that when Congress has spoken within its constitutional powers, the courts are bound. As the High Court has explained, when "Congress' intent is . . . plain . . . policy arguments . . . must be addressed to the body that has the authority to amend the legislation, rather than one whose authority is limited to interpreting it." Laborers Health and Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539, 551 (1988).

This court feels constrained to note that even the policy argument upon which Lindsey implicitly relies is not wholly persuasive. As I now explain, it is not

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in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified. Section 848(q)(9) clearly anticipates that capital counsel will have been appointed under § 848(q)(B) before such need for such technical assistance arises . . . Congress thus established a right to preapplication legal assistance for capital defendants in federal habeas proceedings." Id. While the issue tendered here is distinct from that tendered in McFarland, the same rationale applies to both issues.

unreasonable to conclude that comity concerns suggest an interpretation of the statute providing for investigative expenses when the state fails to do so.

It seems likely that petitioners who have been denied both an opportunity to investigate and relief in state court will, when they return to federal court, contend that the state proceedings were not adequate and any factual findings made during the state court proceedings are not binding on the federal court, see 28 U.S.C. § 2254(d)(1)-(8), and/or, that the state's denial of funds results in the waiver of the exhaustion doctrine due to futility. See 28 U.S.C. § 2254(b) (application for writ of habeas shall not be granted unless state court remedies exhausted or "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner"). See also Gray v. Greer, 707 F.2d 965, 968-69 (7th Cir. 1983) (failure to exhaust excused where there is no meaningful state remedy); Pickens v. Lockhart,

714 F.2d 1455, 1464 n.9 (8th Cir. 1983) (exhaustion requirement excused where it would be futile). Provision of funds under the federal statute, however, precludes claims that a lack of funding rendered the state court procedures meaningless or futile. Thus, a reading of the federal statute to provide investigative funds when the state fails to do so reduces the potential for litigation concerning the fairness of the state proceedings, an issue far more abrasive in character then the provision of funds itself.

In sum, Lindsey's concern for comity and its rationale for ignoring the statute's plain words seem misplaced. First, the "reasonably necessary" standard minimizes concerns about interfering with the state appointment process. Second, applying the statute as written minimizes the risk of review of issues potentially far more demeaning to the dignity of the state courts than the provision of funds. In any event, however, whether this court's observations concerning the appropriate resolution of

comity concerns or Lindsey is more persuasive, the fact is that policy judgments cannot overcome the congressional determination at issue here.

For the above reasons, I conclude that the statute provides for funds for investigation of unexhausted state claims when such funds are reasonably necessary to pursuit of death penalty habeas relief. Accordingly, IT IS HEREBY ORDERED:

1. The order striking the respondent's appearance and brief is VACATED; and

2. The matter is again REMANDED to the magistrate judge for further proceedings in light of this opinion.

IT IS SO ORDERED.

DATED: July 25, 1994.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT